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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 221

JAMES M. LANDIS, *et al.*,

Petitioners,

vs.

THE NORTH AMERICAN COMPANY,

Respondent.

No. 222

JAMES M. LANDIS, *et al.*,

Petitioners,

vs.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, INCORPORATED,

Respondent.

BRIEF FOR THE RESPONDENTS

JOHN C. HIGGINS,
JOHN S. FLANNERY,
Counsel for Respondents.

JOSEPH P. TUMULTY,
Counsel for Respondent American Water Works and Electric Company, Incorporated.

SULLIVAN & CROMWELL,
MCKENNEY, FLANNERY & CRAIGHILL,
Of Counsel.

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BRIEF FOR THE RESPONDENTS

THE APPEALS

The petitioners (hereafter called the defendants) have obtained, by writs of certiorari, a review by this Court of two identical decrees of the United States Court of Appeals for the District of Columbia, entered June 22,

1936 (R. 215),* reversing two identical interlocutory orders of the Supreme Court (now the District Court) of the District of Columbia which granted identical motions made by the defendants to stay suits in equity commenced against them in that Court, one by each of the respondents (hereafter called the plaintiffs).

DATES

The plaintiffs' bills were filed on November 26 and 27, 1935 respectively, the bill of The North American Company being the first filed. The defendants' motions for the stays were filed on December 7, 1935 (R. 24). The stays were granted on January 6, 1936. The plaintiffs obtained leave to appeal to the Court of Appeals, and the order of the Court of Appeals reversing the order of the Court below was entered on June 22, 1936 (R. 215-227). The defendants' petitions for certiorari were filed on July 24, 1936, and were granted by this Court on October 12, 1936 (R. 230).

THE STAYS

The stays were stays of all proceedings in the plaintiffs' suits "until the validity" of the Public Utility Holding Company Act of 1935** "has been determined by the Supreme Court of the United States in the case of the *Securities and Exchange Commission* vs. *Electric Bond and Share Company, et al.* [hereafter called the *Bond and Share* case], now pending in the District Court of the

*All page references are, unless otherwise noted, to the printed Record in the *North American Company* case.

**49 Stat. 803.

United States for the Southern District of New York or until that case is otherwise terminated" (R. 25).

The only condition of the stays was that the *Bond and Share* suit should be diligently prosecuted by the plaintiff therein, the Securities and Exchange Commission (R. 35).

The stays were granted before the defendants had answered or otherwise moved.

CHARACTER OF THE STAY*

The stay was a stay *in limine* to enable the party obtaining it to prosecute *to final judgment in another court against another litigant of his own selection another law suit* commenced simultaneously** with the stayed suit, to which preferred suit the stayed plaintiff in the other suit was not made or invited to become a party, *and in which he had no right to intervene.* The only reasons assigned for it were that the stayed suit was one of a large number of other suits commenced or about to be commenced against the defendant in the stayed suit, and that the issues in all of the suits were such that the final judgment in the preferred suit *might* determine the issues in the stayed suit, *** and that the great number of the other suits would "tend to clog the courts, overtax the facilities of the government and make against that orderly and economical disposition of the controversy which is the government's aim" (R. 24-25).

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*As the stays in both suits are identical we will usually refer to them hereafter in the singular.

**The North American bill was filed on the same day as the bill in the *Bond and Share* suit, the Water Works bill the next day.

***The defendants' own language is that the *Bond and Share* decision will "tend to simplify" or "substantially narrow" the issues in the plaintiffs' cases. This alleged reason was not stated in the defendants' motion and only appeared in their briefs and oral argument.

In practical effect, therefore, the stay created, as Judge Groner pointed out in his opinion in the Court of Appeals (R. 220), precisely the same situation that would be created if a litigant, threatened with a multiplicity of suits against him involving similar but concededly not identical issues, instead of bringing a bill in equity against his adversaries to combine their cases in one suit, took the initiative by himself selecting only *one* of them as a defendant, and then, by separate, independent bills against the others enjoined them from *commencing* their actions against him until the controversy between him and his single selected adversary had been finally decided by the court of last appeal. The defendants have never attempted to show that in the ordinary calendar course the *Bond and Share* case would probably be tried before the plaintiff's cases. The motion for the stay alleges that it is the aim of the Government to obtain an "orderly and economical disposition of the controversy". This is the only allegation in the motion which could be taken to refer to such things as calendar congestions and other matters primarily of concern only to the courts and to other litigants. But with respect to such matters, the defendants have neither made nor attempted to make any showing whatever.*

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*Of course, there is not a word in the opinion of the learned trial judge to suggest that the condition of the calendars of his own court had anything whatever to do with the granting of the defendants' motions, or that the motion was granted *for any other purpose than to afford relief to the defendants*. Obviously, if the relief of his own calendars had been in his mind, he would have made some statement as to how the trial of *even one* of the stayed cases would clog these calendars, and obviously also the stay would have been conditioned on the continuance of calendar congestion due to other cases. Somewhat amusing, therefore, is the statement in the defendants' brief (p. 67) that the plaintiffs did not "completely" rest their case on the "technical ground that the court was without any power to relieve the calendar from the trial of a multitude of essentially similar suits"—to say nothing of the absurdity of imputing to us any such argument.

THE PLAINTIFFS' SUITS

The plaintiffs' suits are bills in equity to enjoin the defendants (the members of the Securities and Exchange Commission—the plaintiff in the *Bond and Share* suit,—the Attorney General, and the Postmaster General) from enforcing the Public Utility Holding Company Act of 1935 (hereafter called "the Act") against the plaintiffs on the ground that the Act is, as against them, unconstitutional *in toto** (R. 1-24).

OUTLINE OF THE FACTS

As above stated, the motion for the stay was made on December 7, 1935.

Both plaintiffs are holding companies of the class required by the Act to register under it on or before December 1, 1935. Both bills were filed shortly before that date. Each bill alleges that the plaintiff has not registered and declares the plaintiff's intention not to register. (Neither plaintiff has subsequently registered.) Each bill invokes the equitable jurisdiction of the court because of the irreparable damages which it shows that the Act is daily causing the plaintiff, which damages, as each bill also shows, will continue and accumulate until the plaintiff obtains the *final* injunctive relief prayed.** Neither bill

*The North American Company's bill also asks a declaration of the unconstitutionality of the Act under the Federal Declaratory Judgments Act of June 14, 1934 (48 Stat. 955). It seems clear, however, that none of the defendants' alleged justifications of the stay requires consideration of this aspect of the bill.

**Discussion of the sufficiency and relevancy of these allegations as to damages will be found under the appropriate subdivisions of this brief (see *infra*, pp. 36-42).

asks for a temporary injunction and neither plaintiff has since sought one, because, as hereinafter demonstrated (pp. 47-48), a temporary injunction would neither prevent nor ameliorate the damages which the plaintiffs are daily suffering from the Act.

The bill of the defendant Commission in the *Bond and Share* case in the District Court in New York prayed for a writ of mandamus to compel the defendants (Electric Bond and Share Company and five of its corporate subsidiaries) to register under the Act (R. 78). It also sought to enjoin them from engaging in any of the activities forbidden to unregistered holding companies (R. 78).*

Within a few days after the filing of the plaintiffs' bills five other holding companies filed their bills in the same court (R. 80). These bills sought substantially the same relief as those of the plaintiffs. Similar motions for stays were made and granted in all of these suits.

When the motion for the stay was made there were also pending in other United States district courts approximately forty other suits, all or most of them seeking substantially the same relief (R. 79-81). The bills in these district court suits, or most of them, named as defendants the defendants herein, or some of them, as well as the local federal district attorneys and other local federal officials (R. 39).

The Washington defendants in these district court cases (the defendants here) declined, however, to appear in any of the suits, and, under special appearances, by the appropri-

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*The purpose of the Government's bill in the *Bond and Share* case is incorrectly stated in the defendants' brief (p. 7) as being to compel the defendants thereto to register *or* to refrain from violating Section 4(a) of the Act. The prayer is (R. 78) to compel them to register *and* to enjoin violations of Section 4(a).

ate motions they have obtained, or will obtain,* the dismissal of these other suits as against themselves (R. 187-188). These motions were all made after the motion for the stay in these suits. As a consequence, the only argument in support of the stays which, as we understand it, the defendants now make based on these suits in the other federal courts is that they may be recommenced in the District of Columbia. None of them, however, has as yet been recommenced. In addition, one of the five other suits against them in the District of Columbia has been withdrawn as that company has ceased to be a holding company. The plaintiffs in the remaining four suits are corporations in one holding-company system. During the oral argument before the trial court counsel for these companies stated that if these plaintiffs' suits were tried, the companies which he represented were willing to hold their suits in abeyance. At present, therefore, the "multiplicity" of pending and really *im*pending suits against the defendants to test the constitutionality of the Act *has dwindled to the plaintiffs' two suits.*

The motion was made by the Attorney General and by the general counsel for the Commission. It was unverified and unsupported by affidavits (R. 24-25). No fact was stated in it in substantiation of the above quoted general statement about "overtaxing the facilities of the government",** and no testimony or affidavit was later offered to

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*Some of the motions are being held in abeyance, but it is undisputed that the defendants are entitled to have these motions granted whenever they desire to press them.

**Equity Rule 51 of the Supreme Court of the District of Columbia requires applications for continuances beyond the term to be supported by affidavit. Law Rule 45 requires all applications for continuances to be so supported. The rules do not specifically refer to "stays".

support it, although the defendants later made extensive additions to the record in other respects.*

In this connection we think it is permissible (since the defendants' brief refers at length to recent developments in the *Bond and Share* case) to state the following additional facts—all matters of record in the *Bond and Share* case:

On June 30, 1936 a stipulation was filed in the *Bond and Share* case covering *all* the facts in the case on which it was to be tried in the district court.** This was eight days after the Court of Appeals had reversed the stays in these cases. The main briefs of all parties in the *Bond and Share* case were filed on or about September 15, the reply briefs of all parties on or about October 10. The case was first set for oral argument before the district judge on October 5 and is now set for November 11. Therefore, the only remaining "tax on the facilities of the government" in the *Bond and Share* case is the oral argument in the

---

*On February 19, 1936, the defendants filed a motion with accompanying affidavits and exhibits, among others, a copy of the amended and supplemental bill in the *Bond and Share* case and the answer thereto. This was done in order to make a formal record on the appeal to the Court of Appeals of certain statements made on the oral argument for the stay (R. 36-184). Pages 46 to 184 of this supplemental record relate entirely to the *Bond and Share* case.

On February 26, 1936, the plaintiffs answered this motion, but agreed to waive irregularities, and stipulated that the affidavit and exhibits might be considered a part of the record on the appeal (R. 184-188).

**This means merely that there will be no evidence offered on the hearings in the trial court, and not that the parties *have agreed* as to all the facts; for the stipulation shows that there are certain questions of fact as to which the parties are in disagreement, in addition to being also in disagreement as to the relevancy and materiality of other facts. Such matters are covered by the stipulation of each party as to how witnesses for the adversary party would testify if such testimony should be held relevant and material.

district court and on any subsequent appeals and the preparations of the briefs on such appeals.

Each of the plaintiffs filed a sworn answer to the motion for the stay (R. 25-31), alleging that the issues of both law and fact in the *Bond and Share* case are entirely dissimilar to the issues in its case, and also showing just how it would be irreparably damaged by the stay.

THE OFFER OF COUNSEL FOR THE PLAINTIFFS

During the oral argument of the motion counsel for the plaintiffs reviewed the offers which had previously been made to Government counsel by him and by the utility industry to arrange for the trial of three or four test cases in a single consolidated suit and to hold all other cases in abeyance pending the final decision of the test cases. After stating that the Government attorneys had ignored these offers, counsel renewed the offer in open court. This proposal, and the Attorney General's refusal to consider it, read as follows (R. 197):

> "Mr. Higgins: If counsel for the Government really want in these cases to avoid a multiplicity of trials and suits and proceedings and if they will meet any of our overtures half way, I undertake to say that it will not be difficult for us to agree upon a group of three or four cases which will present every question that is involved in this multitude of suits, so that every one of these companies may be satisfied that its rights will be promptly determined—*consolidate them all in one case, in one court, and try them out*—so that the Government need not multiply its staff and need not exhaust its budget; and if it can go ahead, *if it wants to go ahead, to a*

fair determination of those issues in one case, in one court, we will know then, in a year's time, perhaps, just what the fate of all these companies is to be.

* * *

"The Court: I will take the case under consideration. In the meantime if the parties can reach any agreement as to the hearing of these cases, any agreement such as suggested by Mr. Higgins, of course, I shall be glad if you do so. Otherwise, of course, I will proceed to act on this application.

"The Attorney General: I think such negotiations will be entirely futile, your Honor.

"Mr. Higgins: I will say, in spite of the Attorney General's statement, we are entirely willing to undertake such negotiations. We do not propose to force ourselves on him, however."

This offer was made on behalf of the industry as a whole; it has always remained open, and is still available to the defendants.

CERTAIN OTHER MATTERS WHICH THE DEFENDANTS HAVE URGED TO JUSTIFY THE STAY

Before the commencement of the plaintiffs' suits the defendant Commission had offered to accept notices of registration under the Act containing reservations to the effect that registration should be without prejudice to the right of the registrant thereafter to challenge the constitutionality of the Act (see R. 41-42). Before the plaintiffs' suits were commenced the defendants had also announced that they did not intend *for the time being* to prosecute holding companies required to register for failing to register or for

thereafter doing any of the acts prohibited to unregistered companies (see R. 42-45). The arguments based on these announcements are hereafter discussed (see *infra,* pp. 42, 45).

Both on the argument in the trial court and in their reply brief in that court the defendants definitely threatened that they would suffer a default in the plaintiffs' cases if their stay should not be granted (R. 34). The argument in support of the stay based on the possibility that the defendants may thus default is hereafter discussed (see *infra,* pp. 48-51).

In the trial court the defendants offered to submit, during the period of the stay, to a *temporary* injunction. The argument that this offer justifies the stay is also elsewhere discussed (see *infra,* p. 46).

THE ALLEGED DISTINCTION BETWEEN WANT OF POWER TO GRANT, AND ABUSE OF POWER IN GRANTING, THE STAY

We wish to state at the outset that we do not dispute the inherent power of all courts, although lacking *ad hoc* constitutional or statutory authority, to grant "stays" of proceedings before them, in addition to the less comprehensive delays which are usually designated by other words and many of which are frequently limited and otherwise controlled by practice acts or court-rules. In one sense, therefore, it is true that no question of judicial "power" is here involved.

But, since there must in the nature of things be some frontiers to this "power" to grant stays, and since it seems clear that (in the absence of less elastic statutory

metes and bounds) these boundaries must necessarily be coterminous with those of a sound judicial discretion, it follows that when the limits of sound discretion have been passed, it is all one whether we say that the court has acted without power or has abused its power. The Court will therefore find that in many of the cases cited in this brief the courts in condemning improvident stays use the language of want of power. That such language in such cases means, however, no more than that judicial discretion was abused is clear from the fact that in none of these cases is there any thought of questioning the general "power" of courts to grant stays, and by the further fact that in none of them does the decision turn on any circumscription of these powers, statutory or otherwise, determined by other limits than those of a sound judicial discretion.*

We therefore pass without further comment defendants' arguments based on the theory that in such a case as this there is some important distinction between a trial court's "power" in the premises and its abuse of that power.

THE QUESTION IN THE CASE

In the light of the foregoing, and now that this Court, having granted the defendants' petition for *certiorari,* is hearing these cases on the merits, we submit that it is quite immaterial whether the opinions of the majority judges of the Court of Appeals can be read as having made the precise "holdings" on abstract propositions of law stated in specifications 2 and 3 of the defendants' "Specification of Errors" (br., p. 19). We believe that the Court of Appeals in fact made no such holdings, and also that it did not hold

*The authorities also show that the power to grant stays is not in the least "equitable", in the sense of being in any way broader in equity cases than in actions at law, as the defendants' brief in many places insinuates (see defendants' brief, pp. 25, 37, 40).

that "the discretionary power of the trial court did not extend to the granting of *a* stay pending the final outcome of another suit if the suits stayed did not involve the same parties and the same issues and if the stayed suits had not yet technically* come to issue" (dfts.' brief, p. 18). We submit that the holding of the Court of Appeals was simply a holding that *on the facts shown by the record before it, this particular stay* constituted an abuse of whatever discretion the trial court may have had in the matter of granting "stays", as distinguished from the more ordinary forms of delays. But however that may be, we submit that this and this alone is the question now before this Court. It is therefore wholly immaterial whether a stay is improper (a) merely because it is granted before answer, or (b) merely because the issues in the stayed suit are not identical with the issues in the preferred suit, or (c) merely because the stayed party is not a party to the preferred suit, or even whether or not (d) a stay *of some sort* may be granted even if all these three factors—lack of identity of issues and of parties, and failure of joinder of issues—are combined.

SUMMARY OF THE ARGUMENT

We present here a short summary of the argument in this brief:

A. The defendants did not and do not *need* the stay:

1. Because they were not when it was granted and they are not now threatened with any real multiplicity of suits. This is shown by the facts al-

*"Not yet technically come to issue" is hardly an adequate or accurate description of a case where no motion, plea, or answer whatever has been filed. The defendants' euphemism here is much like their characterization of this stay as "merely temporary".

ready stated with reference to the suits in the other District Courts and the offer of plaintiffs' counsel to select test cases. These matters are further discussed on pages 25 to 30 of this brief.

2. Because they have completely failed to show that a stay of the character granted them was necessary to give them all the time that they might reasonably need to answer the plaintiffs' bills and after answering prepare for the trial of the cases.

B. A multiplicity of suits, even if it existed, could not possibly justify a stay of this character. This is shown on pages 23 *et seq.*

C. The plaintiffs are being irreparably injured *by the stay itself*. The nature and extent of the injuries which the plaintiffs are suffering are shown in Section

Sections II, IV, VI and VII, pages 21, 42, 46 and 48,

V, pages 45 to 46, and Appendix B answer the argument that the plaintiffs' bills do not show a right to relief against the Act in equity.)

D. The facts in the *Bond and Share* case, both as they existed when the stay was granted and *as they now exist*, show that there is no such "similarity" between the issues in that case and the issues in the plaintiffs' cases to justify the stay, even if similarity of issues might otherwise be held to justify such a stay (Section VIII, pages 51 to 75). Not only is there no such "similarity" of issues, but in truth there is complete

dissimilarity of issues on vital and controlling facts. The defendants by their arguments and allegations in the *Bond and Share* case have virtually conceded that the Act cannot be upheld unless the business of holding companies constitutes interstate commerce. By far the largest portions of their bill and their briefs in the *Bond and Share* case consist of allegations and arguments seeking to show that because of domination over subsidiary companies and because of "vast" and "extensive" and "interstate" services the Bond and Share system constitutes an "interstate empire". The record in the *Bond and Share* case shows that the Government rests its case almost wholly on these alleged facts. The plaintiffs' bills show that such facts do not exist in the plaintiffs' cases. This difference between *Bond and Share* and the plaintiff companies as to these fundamental and controlling facts completely differentiates the *Bond and Share* case from the cases at bar. If there should be a final decision holding the Act constitutional as to *Bond and Share* on the above facts, these plaintiffs would still be left with nothing determined as to their own status and with further years of litigation and losses ahead of them before their rights could be finally adjudicated.

E. The record in the *Bond and Share* case shows that the defendants themselves contemplate that the *Bond and Share* case may be decided by this Court or otherwise disposed of on grounds which will leave the issues in the plaintiffs' cases wholly untouched. The defendants, despite their statements in the cases at bar as to the broad scope of the *Bond and Share* case, are seeking by every means within their power *to limit the scope*

of that case to the single question of the constitutionality of one provision of the Act—the provision requiring public utility holding companies to register with the Commission. They have made technical motions and have advanced procedural and jurisdictional arguments to this end. These matters, as well as those referred to in point D above, are fully shown in Section VIII, pages 51 to 75, dealing with the *Bond and Share* case. They are, for the most part demonstrated by the arguments of the Government itself in that case.

F. Even if the issues in the *Bond and Share* case were identical with those in the plaintiffs' cases, the stays would be beyond the discretionary power of any court. This is shown in Sections I and II, pages 17 to 36, and Appendix A. The considerations there adduced apply with special force to a stay of the character of the stays in question in suits involving momentous questions of constitutional law of life-and-death importance to the stayed litigants. For the defendants' stay has permitted Government officials to do two things. First, it has permitted them to select out of the many companies to whom the Act is in truth a "death sentence", a single adversary, presenting (as is shown in Section VIII, at pages 66 *et seq.*) a factual *set-up* which they believe is most likely to support their constitutional arguments; it has permitted them to prosecute this preferred suit in a jurisdiction of their own choosing; and it has permitted them to try it, not on the evidence of witnesses in open court, but on facts stipulated between themselves and that adversary. And second, it has permitted them while trying this case to final decision on appeal, to deny to all of their other adversaries the right

to be heard on any of the issues in their own cases, not only on those issues which are similar to but also on those which are entirely different from the issues in the preferred case.

ARGUMENT.

I. FOR PRACTICAL PURPOSES THE STAY AMOUNTS TO A RENUNCIATION OF JURISDICTION BY THE TRIAL COURT

To a litigant suing in the only court which has jurisdiction to entertain his suit, and in urgent need of the speediest relief which that court can possibly give him, it matters not in the least whether the court dismisses his case because of a mistaken belief that it has no jurisdiction over it, or whether, while nominally asserting its jurisdiction, it grants a "stay" of the suit for any length of time beyond what is absolutely required for the proper administration of its other business, and after giving fair consideration also to the adversary party's situation. Since the consequences to the litigant are the same in either case, the court's nominal retention of "jurisdiction" in the latter case becomes a mere legal mockery.*

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*Note as to pleas in abatement. We do not understand that the defendants attempt to justify the stay on any analogy, however remote, to the relief afforded in situations permitting the common-law plea in abatement because of another action pending, or the equivalents of this plea under Practice Acts. Nevertheless, we may point out that such relief (even under the greatest liberalization of the strict common-law rules as to the situations in which it may be granted), always presupposes the *preexistence of another and earlier-commenced action between the same parties and involving the same issues.* Whatever, therefore, may be the form ("stay", dismissal, or what not) of the relief granted in such situations, regarded realistically the relief is justified because, *without causing injury to the party whose suit is abated*, it protects his adversary from being twice vexed by him on the same claim, and also because it protects other litigants in the court granting it from the delays incident to overcrowded calendars.

It is fundamental in our jurisprudence that when a court has jurisdiction it must act, whether it wishes to or not.* Thus (*and precisely in connection with constitutional questions*) Chief Justice Marshall stated in *Cohens* v. *Virginia*, 6 Wheat. 264, 404:

> "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. *With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.*** Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

In *Henry* v. *Dick Company*, 224 U. S. 1 (1912), the Court reiterated that *irrespective of the consequences* it had no power to refuse to decide a controversy properly before it.***

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*There are, to be sure, certain classes of actions where some courts exercise some degree of discretion in the matter of entertaining jurisdiction. Some courts, for example, exercise such discretionary powers in actions on foreign torts. Another, and more important, class of such cases is exemplified by three decisions of this Court which the defendants have cited in their brief. The total inapplicability of these cases to the situation at bar is shown elsewhere (*infra*, p. 30).

**Italics in quoted matter are always ours unless otherwise noted.

***See also the cases cited and discussed in Appendix A, where even though the parties were the same and the issues identical or practically identical in both suits, the courts have held that they have no power to grant stays merely in order to permit *some other court* to decide the issues first.

Of course, no mere "stay" of proceedings is a denial that jurisdiction exists, or even, in the strict legal sense, a discretionary refusal to entertain jurisdiction. Nevertheless, it is plain that the principles thus enunciated by Chief Justice Marshall apply with equal force *to stays such as the defendants have obtained here.**

For action by a court means not merely some academic "recognition" or "assumption" of jurisdiction. It means the *exercise* of its jurisdiction, *by hearing and deciding the case;* and delay of such action may be, and frequently is, tantamount to denial of relief.

And thus it is that even a *statute* providing for an indefinite stay of certain actions has been held unconstitutional. *Sliosberg* v. *New York Life Insurance Company,* 244 N. Y. 482 (1927). The statute stayed actions on certain Russian contracts until there should be a government in Russia recognized by the United States. The indefinite and possibly prolonged character of the stay was held to impair the obligation of these contracts. It seems equally clear that a plaintiff is deprived of his property without due process of law by a stay, the wholly unnecessary duration of which unreasonably compels him to sustain constantly accruing damages which will continue to increase until he obtains the *final* relief which he seeks.

The defendants, of course, did not seek their stays because the plaintiffs brought their suits in the Supreme

*The defendants' brief states in several places that their stays are "only temporary". We do not know what a permanent stay is, and the defendants do not explain. "Temporary", however, hardly seems to be the best adjective in the dictionary to describe a stay which has already run for almost a year, leaving the plaintiffs' bills not even *answered,* and will almost certainly continue to run for well over another half year at least. Characterizing the delay which the stay has caused in the progress of the plaintiffs' cases as temporary, seems to us much as if a railroad, let us say, should announce that floods which had completely suspended traffic on one of its lines for several days had caused its trains to run "a little off schedule."

Court of the District of Columbia *rather than in some other court.** The stays were sought because the plaintiffs had undertaken to sue *in any court* until the defendants' own suit against Bond and Share should be decided; and this in spite of the fact *that there can be no possible question of the good faith of the plaintiffs in commencing them in the District of Columbia*—the official domicile of the defendants. The defendants cannot be sued in any other jurisdiction without their consent, and, as above shown (p. 6), they have invariably refused to give that consent in the suits against them by other holding companies commenced in other federal district courts (R. 187-188). Accordingly, it will not be disputed that if the plaintiffs had brought their suits in the District Court for the Southern District of New York, where the *Bond and Share* suit is pending, the defendants would have made the same motions to quash the service of process against them that they made *in the four suits by other holding companies which were brought against them in that court* (R. 79-80).

The defendants have never denied that the purpose of their motion for a stay was to secure *a complete monopoly of the litigation involving the constitutionality of the Act* until their own case against their own specially selected defendant is finally determined. And thus, in the guise of a "stay", they have sought and obtained what amounts to a prolonged and indefinite renunciation of jurisdiction of the case by the court in which it was rightfully brought—the only court in which they can be sued without their consent.

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*We may note, however, that even if this had been the fact, *and even if the plaintiffs could have sued in some other court,* there could be no possible analogy to the class of cases referred to in our footnote on page 18, where the courts have exercised discretion in entertaining jurisdiction. See discussion of cases *infra,* pp. 33-35.

Such being the actual nature of the stay, what are the authorities?

II. THE QUESTION ON PRINCIPLE AND ON THE AUTHORITIES.

Introduction

We may concede that we are unable to cite a single case which can be said to be squarely in point on the question presented by this appeal—if by a decision "squarely in point" is meant one which holds that a stay precisely on all fours with the defendants' stay here is an abuse of the discretionary power of any court. But the reason why such a decision seems never to have been rendered would appear to be that heretofore no such stay has ever been requested. We believe that the reason for this wholly unprecedented character of the defendants' motion will undoubtedly be found in the long and uniform current of decisions over many years and in many jurisdictions which, on many varying sets of facts in many types of action, have charted an ambit of permissible discretion in the matter of stays, the farthest reach of which on any possible combination of the material factors could not conceivably be held even to approach a stay such as that which the defendants have obtained. For their stay—*not to mention the pecuniary damages caused by it*—is one which:

(a) is granted *in limine* to the defendant in the stayed suit;

(b) is granted in favor of his own suit commenced in another court simultaneously with the stayed suit; and it

(c) is to continue until the determination on final appeal of the preferred suit, where

(d) such final determination may concededly not be obtained for several years, if at all, and where

(e) the stayed plaintiff is not a party to the preferred suit, is not invited to become a party, and has no right to intervene in it on his own motion, and where also

(f) the issues in the two suits are concededly not identical, but only similar in some aspects.

Mere citation of the cases on which the plaintiffs rely would mean little. To show how clearly they establish the conclusion that no such stay as the defendants have obtained has ever been asked for because it was a foregone conclusion that no court would grant it, it has seemed advisable to state the facts in most of these cases in some detail, together with relevant portions of some of the opinions. In order, therefore, not to interrupt the continuity of this argument, we have placed our consideration of these cases in an Appendix (A), confining ourselves in this portion of our brief to a discussion of the cases which the defendants rely on as justifying their stay.

The Element of Damages Caused by the Stay Itself

The authorities showing that a stay of the character of the defendants' stay is wholly beyond the power or proper discretion of any court to grant, show also that this is so *even without reference to the question whether the stayed party will be pecuniarily damaged by the stay itself.* In

support of this statement, we call attention to the fact that only in a very few of the cases is this factor even mentioned by the courts. Moreover, many of the actions or suits sought to be stayed were merely to recover damages, and in none of these cases was the stay denied because the court found that the delay might make it impossible or difficult for the stayed party to collect his claim when he eventually obtained his judgment. It seems obvious that the reason for this is, not that damages *from the stay* are presumed until the contrary is shown, but that the right of suitors to obtain the promptest possible relief which the courts can give them is one which must be preserved at all hazards if the courts are to retain the confidence and respect of the people.

Nevertheless, it seems clear that the case against such a stay as the defendants' will become completely unanswerable if it can be shown that the stay itself may cause the stayed party great and irreparable damages. That this is the fact in the instant case is, we believe, conclusively shown in other portions of this brief (*infra*, pp. 36-42, 46-48).

The Attempt to Justify the Stay as Relief Analogous to That Afforded on a Bill to Enjoin a Multiplicity of Suits

1. The Law

It is true that in all but a few of the cases concerning stays discussed in Appendix A of this brief only *two* suits were involved—the suit sought to be stayed and the suit sought to be preferred. Can it be said, then, that for this reason the principle of these cases does not extend to a situation where a party seeking a stay of a suit against him,

in favor of a suit of his own choosing against a specially selected defendant, is *also* being sued by a large number of *other* parties? *In other words, can a stay such as the defendants have obtained be justified on the analogy of a bill in equity to enjoin a multiplicity of suits?*

For the defendants' brief nowhere challenges the obvious correctness of the statement in Judge Groner's opinion that the situation at bar *is precisely the same* as if the defendants had sought by original bills in equity to enjoin the respondents here and the other stayed plaintiffs from *commencing* their suits until the final determination of the *Bond and Share* case by this Court.

We submit that there is not even the remotest analogy between the relief which the defendants sought by their stays and the relief sought by a plaintiff in a bill in equity to enjoin a multiplicity of suits. For the undeniable fact is that the purpose of a bill to enjoin a multiplicity of suits *is the direct opposite of the purpose for which the defendants sought their stays*, because a bill to enjoin a multiplicity of suits is brought neither to prevent nor to delay the defendants to it from *themselves* litigating the issues, whatever they may be, between themselves and the plaintiff. It is brought merely for the purpose of compelling them to try these issues along with the trial of the same (or, sometimes, of very similar) issues between the plaintiff and the other defendants. It frequently happens that a person who is threatened in different jurisdictions in which he is amenable to process with a large number of law-suits involving the same or similar issues, is himself unable to obtain valid service of process on all of these potential plaintiffs in one jurisdiction. If it were the law that a person so situated could select one or more of these potential plaintiffs to sue in

one jurisdiction, *and then bring bills in equity against the others in the jurisdictions in which they can be reached with process* to enjoin the prosecution by them of their threatened suits against him;—if such were the law, surely the rule, together with its proper limitations, would long since have been established by the decisions of many courts. For situations in which such a rule, if it existed, would be invoked are by no means of infrequent occurrence, particularly in the case of large modern corporations. But of course the defendants have cited and can cite no decision establishing any such rule or even intimating its possibility *obiter*. We therefore submit that here again the reason why no such relief has ever been sought is obviously that it would all too clearly conflict with the fundamental principles of our jurisprudence discussed above and enunciated and applied in the cases cited by us.*

2. The Facts

We have already shown that the defendants (as indeed they themselves assert) may at any time obtain the dismissal as against them of all the suits brought in the other

*In the light of the fact that the purpose of a bill in equity to enjoin a multiplicity of suits is to bring all the adverse litigants *into court in one suit,* while the admitted purpose of the defendants' stay is precisely to keep all but one of them (Bond and Share) *out of any court,*—in the light of this fact, how can it possibly be material that on a bill to enjoin a multiplicity of suits the issues between the plaintiff and all of the defendants need not always be identical? We respectfully submit, therefore, that the defendants' attempted use of the holding of this Court to this effect in *Di Giovanni* v. *Camden Fire Insurance Association*, 296 U. S. 64 is an obvious misapplication of that decision. Also it is unnecessary to consider here whether in a proper extreme case a party might not be enjoined from prosecuting in one jurisdiction a suit involving the same issues as those in an earlier commenced suit in another jurisdiction between the plaintiff and other parties, *if the enjoined party were offered the opportunity of becoming a party to the earlier suit.*

district courts which have not already been dismissed; that none of these suits has yet been recommenced in the District of Columbia; that one of the seven suits in the District has already been withdrawn; that the plaintiffs in the other suits in the District are all companies belonging to one holding-company system; and that the attorneys for these plaintiffs have agreed that these suits may remain in *statu quo* until after the plaintiffs' cases have been tried; that therefore the alleged multiplicity of pending and imminently *im*pending suits (other than the *Bond and Share* case) involving the constitutionality of the Act reduces itself to two—the plaintiffs' suits;—and that in the *Bond and Share* case there now remain to "tax the facilities of the Government" only the oral arguments and the preparation of the briefs on any appeals to the Circuit Court of Appeals and to this Court. We think it is therefore unnecessary to add anything to this aspect of the cases at bar, except to say that, if any of the suits in the other district courts *should* be recommenced in the District of Columbia, they will not be reached for trial in the ordinary calendar course until at least a year after the plaintiffs' cases have been tried, and that, as concerns answers and such-like matters, the trial court would of course grant the defendants whatever extensions of time they might show to be reasonably necessary.*

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*We should, however, call attention here to a serious error contained in one of the statements in the opinion of the learned trial court—a statement on which he seems to have laid some stress. It was that "counsel seemed to agree" that the cases in the other district courts were defective for want of jurisdiction and that if dismissed they would probably be recommenced in the District of Columbia (R. 31). Counsel did agree that these suits could at any time be dismissed as against these defendants; but the further statement as to counsel's belief that they would probably be recommenced in the District is wholly mistaken—at least so far as plaintiffs' counsel are concerned. And, if counsel for the Government did at that time apprehend a prompt recommencement of any of these cases in the District, the lapse of almost a year without the recommencement of any of them shows that their apprehension was unfounded.

3. The Offer to Select Test Cases.

The refusal of the Attorney General *even to consider* the proposal (*supra*, p. 9) of plaintiffs' counsel, made prior to the motion for the stay and renewed in open court during the oral argument on the motion, that the companies which had instituted these suits against the Commission would cooperate with the defendants in selecting three or four companies, fairly representative of the different types of organizations in the utility industry, whose suits could be consolidated into one test suit and tried in one court, shows, we believe, beyond question that the object of the defendants' motion was not to avoid any real multiplicity of suits against them under the Act, but was to prevent any test of the Act as applied to utility holding company organizations of a type different from the Electric Bond and Share organization until after the decision of this Court in the *Bond and Share* case. The trial court brushed aside this proposal by observing that it "has not been consented to by the defendants", and that counsel for the plaintiffs "cannot answer for the fifty-odd cases now pending in the other courts" (R. 34). We thought that it had been made clear at the hearing that on several occasions prior to the hearing proposals had been made to the defendants on behalf of the utility companies that an arrangement be entered into whereby all of the suits, both in the court below and in the other courts, be held in abeyance, except the three or four cases that might be agreed upon with the defendants as presenting a fair and comprehensive test of the Act, and that the industry was ready to arrange with the defendants a consolidation of the cases so agreed upon in one trial in one court. The proposal made by plaintiffs' counsel in

the court below, which is quoted in full earlier in this brief (p. 9), made it clear that counsel was referring *not only* to the cases instituted in the court below, but also to all of the cases brought by the other companies in the other district courts.

The point is, not that the parties after conferences might have failed to agree on the other cases to be selected; *the point is the Government's flat refusal even to consider the proposal.*

Certainly the resources of the Department of Justice and of the Commission would not be unreasonably taxed or their combined legal staffs be inadequate to engage in the trial of the *Bond and Share* case and also in the consolidated trial of two or three other test cases selected by the defendants in cooperation with the industry. So far as concerns the plaintiffs at bar, we do not believe that the Government will dispute that it has long since collected what it believes to be the important material facts concerning their business.* And if the defendants are correct in their contention that most or many of the issues in the plaintiffs' cases will be presented in the *Bond and Share* case, their preparation for the trial of that case must also have covered most of the preparation for the trial of the plaintiffs' cases.

The defendants' brief also argues that counsel's offer to select test cases is inconsistent with the plaintiffs' assertion that they are being injured by the stay.

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*See the frequent references in the defendants' brief (pp. 55-58, 88, 89, 92) to the Report of the Committee on Interstate and Foreign Commerce of the House of Representatives, pursuant to H. Res. No. 59, 72nd Cong., 1st Sess., and H. J. Res. No. 572, 72nd Cong., 2nd Sess., House Report No. 827, Part 3, and the detailed statements of facts concerning the nature and character of the plaintiffs' business in the Attorney General's affidavit (R. 39-40).

We believe that the Court will see from our discussion of the Government's briefs in the *Bond and Share* case (see *infra*, pp. 51-75) that Bond and Share was undoubtedly selected by the Government as its defendant principally because it believed that, if the Act is held constitutional as to only some of the holding companies, within the definition of Section 2(a)(7), then Bond and Share is a clear example of the one type of holding company as to which, upon the Government's contentions, the Act should be held constitutional. This is because of Bond and Share's alleged interstate servicing activities, and because of the relations which the Government asserts that the evidence in the *Bond and Share* case shows to exist between Bond and Share itself and the operating subsidiaries in the Bond and Share system which are engaged in interstate commerce,—relations which the Government contends justify a finding that Bond and Share is *itself* engaged in interstate commerce. Accordingly, if the Government had consented to select other test suits, an effort should of course have been made to select for one of these suits a holding company at the other end of the scale—namely, a holding company doing no intercompany or interstate servicing at all, and the operating subsidiaries of which could not possibly be regarded as its "dummies", whatever might be its stock investment in them, direct or indirect. Plaintiffs' bills show clearly that one or both of them are holding companies of this latter type and not of the type asserted by the Government's briefs in the *Bond and Share* case to be exemplified by Bond and Share.

And lastly,—*and since the defendants' argument necessarily assumes that neither of the plaintiffs' suits would have been selected as one of the test cases*—we think that there is

no impropriety in our stating that the defendants at the time knew that they would be able to obtain the consent of the other stayed plaintiffs and of the industry as a whole to having one or both of the plaintiffs' cases selected as test cases. The above completely answers the point that counsel's offer to select test cases is an admission that the stay is innocuous.

The Cases Relied On by the Defendants

We submit the following statement as to the facts and decisions in the cases on which the defendants mainly rely to justify the stay.

Kansas City Southern Railway Company v. *United States*, 282 U. S. 760 (dfts.' brief, p. 27). This case is merely an illustration of the settled rule that a plaintiff's suit may be stayed for proper reasons, *when he has a complete and prompt remedy in another pending suit, in which he is already a party or to which he has the right to become a party.* A number of railway companies had been parties to a single proceeding in which an order affecting rates for transportation of private cars had been entered by the Interstate Commerce Commission. Two groups of companies attacked the order, one by a suit in Kentucky and the other by a later suit in Missouri. The Commission and the Government made no reference in their answer in the Missouri suit to the prior Kentucky suit. The Kentucky suit resulted in a decree sustaining the order of the Commission. The Commission and the Government thereupon, and on the day of final hearing, filed an amended answer in the Missouri suit, setting up the decree in the Kentucky suit as an affirmative defense and asserting that, under the Act redistributing the jurisdiction of the Com-

merce Court, the jurisdiction of one district court could not be invoked to enjoin an order of the Commission after the order had been sustained by another district court. This Court overruled this affirmative defense, but sustained the Commission's order on the merits. In overruling the affirmative defense, the Court held that the court in Missouri committed no error in proceeding with the cause, notwithstanding the prior decision of the court in Kentucky, the opinion, however, stating *obiter* that the court in Missouri might, in its sound discretion, upon a timely application, have stayed the case before it pending the decision in the Kentucky case. The Court's reason for this statement was as follows (p. 763):

> "The appellants, [the railway companies] upon proper application *could have been allowed to intervene in the earlier suit* * * * and could have presented *there all of their grounds of attack* upon the orders in question."

In contrast, the plaintiffs here have no right to intervene in the *Bond and Share* case, nor could the court lawfully permit them to intervene; and the admitted object of the stay sought by the defendants at bar is to *prevent* the plaintiffs from procuring an adjudication of their rights in *any* suit until after defendants have prosecuted their own suit against Electric Bond and Share Company to a decision in this Court.

Moreover, the order in question in the *Kansas City Southern* case was one clearly applicable alike to all carriers and a decision on the validity of the order in one case would necessarily have been completely applicable in the other. In addition, there is absolutely nothing in the decision to indicate that the companies whose suits might,

upon application, have been stayed, would have in any wise been injured by the delay in the trial of their cases.

For all of the above reasons, the *obiter* from this case, relied upon by the defendants, can have no application to the cases at bar.

Friedman v. *Harrington*, 56 Fed. 860 (C. C. D. Mass., 1893) (dfts.' brief, p. 30). The bill was to enjoin the enforcement of a Massachusetts statute, alleged to be unconstitutional. *The question arose on a demurrer to the bill.* The court declined to pass on the demurrer, and continued the case *merely until the next term of the court.* The reasons for this short continuance were (a) that the question of the constitutionality of the statute *was already before the Supreme Court in two other cases which were likely to be "speedily reached"*, and (b) *that the property rights of the defendant were not endangered by this slight delay.*

Enelow v. *New York Life Insurance Co.*, 293 U. S. 379 (dfts.' brief, p. 26). Apparently this case has been cited simply because of a single sentence in the opinion with reference to the general powers of courts to grant stays "to maintain the orderly processes of justice". As the facts show,* the Chief Justice was merely pointing out in

*The action was an ordinary action at law on a policy of life insurance brought by the death beneficiary. The defendant pleaded affirmatively fraud in the procurement of the policy, and then moved, under Section 274(b) of the Judicial Code (28 U. S. C. 398) for an order staying the trial of the action at law until the issues raised by the defense of fraud had been tried in equity, *i.e.*, without a jury. The holding of this Court was that the defense was a good defense at law, and that therefore Section 274(b) of the Judicial Code did not apply, and that the defendant was not entitled to the "stay" which had been granted to it, and which, as the Court said, was the statutory equivalent of an injunction in equity against the prosecution of an action at law.

this statement the plain distinction between the ancient equitable jurisdiction of courts of equity to enjoin actions at law, and the power of *all* courts—"a court of law as well as a court of equity"—to grant reasonable delays, continuances or other "stays" in any case, in order "to control the progress of the cause so as to maintain the orderly processes of justice".

No one disputes that the courts do not need express constitutional or statutory authorization in order to grant reasonable adjournments and other postponements of pending litigation. And of course the only difference between the ordinary extension of time, continuance, adjournment, or other postponement in a judicial proceeding, and what is ordinarily called a "stay of proceedings", is that the former are usually adjournments of *specific* steps or processes in the suit, while the word "stay" is usually applied to the form of adjournment which, during its continuance, applies to all further proceedings therein. But a "stay" in this latter sense is not necessarily, or usually, *a stay in limine for an indefinite time in the future.*

The three other cases mainly relied on in the defendants' brief are of an entirely different sort. These cases are *Pennsylvania* v. *Williams*, 294 U. S. 176; *Gordon* v. *Ominsky*, 294 U. S. 186; and *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189 (dfts.' brief, pp. 31, 32, 43).

It is difficult for us to understand how counsel can believe these cases to have any bearing on the situation at bar. For the cases obviously involve only the question of the proper comity *between the Federal and State courts.* They are cases where this Court held that the Federal courts should relinquish jurisdiction in favor of the State courts, where the latter already had complete jurisdiction

(*in rem or quasi in rem*) of the subject matter of the litigation, and full power to grant prompt relief *to all parties to it*—cases, that is, where this Court held that the Federal courts should not interfere with the state courts which were proceeding properly in the administration of the affairs of their own insolvent domestic corporations.

These cases, therefore, involve a mere choice between conflicting jurisdictions, and where the court to which the plaintiff was remitted for reasons of comity could give him as prompt and complete a remedy as the court from which he was sent. The stays at bar, on the other hand, involve a denial to the plaintiffs of a prompt and full adjudication of their cases in *any* jurisdiction (since the defendants cannot be sued outside the District of Columbia), in face of the certainty that they will suffer great and irreparable losses during a long and enforced delay.

The principle of these cases has again been affirmed in *Commonwealth Trust Company* v. *Bradford*, 297 U. S. 613 (1936). In that case this Court, in holding that jurisdiction should not have been relinquished on the ground of comity, said:

> *"Jurisdiction having been properly invoked, it became the duty of the trial court to determine the issues, unless required by rules based on comity to relegate the complainant to the State Court.*
>
> * * *
>
> "The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in *Pennsylvania* v. *Williams*, 294 U. S. 176, 79 L. Ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850, 55 S. Ct. 386, *supra*, is not applicable. In each of those cases we found conflict

> between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation."

How then can these cases be considered as authority for a stay which (a) prevents the plaintiffs from prosecuting their suits in the only jurisdiction open to them, in order that the defendants may first prosecute another suit, in another Federal court, on other facts, against other parties, to a final judgment on appeal, (b) causes the plaintiffs serious damages through the delay of their own suits, and (c) permits the defendants to obtain a decision to be used later against the plaintiffs?

And of course even the defendants, who have been able to discover so many other things in the opinion (or, as it pleases them to call it, "the Findings") of the learned trial court, do not profess to have discovered in it a finding that, in the words of the song from The Mikado, "the deference due" by the District Court for the District of Columbia to the District Court for the Southern District of New York requires that precedence be given to the latter over the former in the decision of constitutional questions.*

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*Counsel also assert that these recent decisions of this Court virtually overrule or are inconsistent with some of the cases on which we rely (collected in Appendix A hereto)—particularly some of the earlier Federal cases in which suits in State courts were sought to be given preference over suits in the Federal courts. They say that these earlier cases apply a "narrower rule" as to the occasions on which a Federal court will relinquish jurisdiction in favor of a State court. We submit respectfully that this is simply not so: that not one of these earlier cases could have been decided differently under the principle of these later decisions, and that not one contains language at variance with that principle.

III. THE BILL OF EACH PLAINTIFF SHOWS CLEARLY THAT IT IS NOW SUFFERING IRREPARABLE DAMAGES WHICH WILL CONTINUE TO INCREASE UNTIL IT OBTAINS THE *FINAL* RELIEF PRAYED FOR

We show elsewhere (*supra*, pp. 22-23) that the decisions which establish the principle that the courts are without power to grant blanket *in limine* stays extending over indefinite but probably long periods* rarely, if ever, consider the question whether the stayed party will suffer pecuniary damages from the particular stay in question; and we show also why this is so.

Nevertheless, in the event that the Court should be of the opinion that the stay at bar might be justified if it appears that the plaintiffs will not be injured by it, we wish to show that the defendants' contentions to the effect that the stay will not injure the plaintiffs are completely untenable.

Of course, we do not dispute that *the stay itself* will not have caused any damages to the plaintiffs if it can be demonstrated that the stay will not postpone the relief for which their bills pray; but the defendants will not deny that they have not even attempted to demonstrate any such proposition as this. At most, they argue that the stay *may not* so postpone the final decision of the plaintiffs' cases. These arguments are answered in other portions of this brief. (See *infra*, pp. 51 *et seq.*).

For the present, therefore, we confine ourselves to discussing the nature of the damages shown by the plaintiffs'

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*The authorities, which are unanimous, are collected and discussed in Appendix A.

bills, since it is evident that, if the above arguments of the defendants are not valid, the damages caused by the stay are exactly the same as the damages which the bills show that the plaintiffs were then suffering and would continue to suffer until the plaintiffs obtain *final* relief.

The acts and activities which are prohibited to unregistered companies by the Act (Section 4(a)) are stated in a footnote.* A reading of these prohibitions is enough to show that, if they are observed, they will make impossible the carrying on of a normal and profitable business by any holding company, in spite of the fact that many of

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*They are:

"(1) to sell, transport, transmit, or distribute or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection."

them are in form prohibitions merely against doing the specified acts by the use of the mails or the instrumentalities of interstate commerce. And it is equally clear that, if these prohibitions are ignored, the cloud which will be cast on the legality of the contracts and other acts of such a company will paralyze its business to practically an equal extent. THAT THIS WAS BOTH THE INTENTION OF THE FRAMERS OF THE ACT AND THE EXPECTATION OF THOSE NOW ADMINISTERING IT IS CLEARLY SHOWN BY THE STATEMENT OF THE DEFENDANT LANDIS, CHAIRMAN OF THE COMMISSION, IN A PRESS RELEASE OF NOVEMBER 7, 1935, IN WHICH HE ASSERTED THAT

> "unless a holding company registers, the validity of any issue of securities which it may offer and of all acquisitions of property and of contracts made by it would be in question, at least until a *final* decision upon the issue of constitutionality was handed down by the Supreme Court."*

It was not therefore the fear of criminal prosecutions for not registering or for doing any of the acts prohibited to unregistered companies which principally compelled the plaintiffs to seek relief in equity. The plaintiffs would welcome prompt prosecution for their failure to register, since the decision in such a case might determine, as promptly as would a final decision in these cases, whether or not they have anything to fear from the Act. But this of course is precisely what the defendants have declared that they will not do,—although they assert the Act to be constitutional and threaten eventually to compel the plaintiffs to comply with it. Nevertheless, they have in effect declared their intention not to do so until the Act has been

*The New York Times, page 1, November 8, 1935.

held constitutional as against some *other* company,—thus not only leaving the plaintiffs in their above predicament during the interval, but with the added possibility that such a decision holding the Act constitutional may hold it constitutional on grounds which will still leave undetermined the question whether it is constitutional as against the plaintiffs, so that they would be held in the above legal limbo for an additional period of unpredictable duration.

If it were the purpose of the defendants to inflict the maximum of injury upon the plaintiffs, they could not have chosen any method more certain to accomplish that result.

The business of each plaintiff is fundamentally the conservation and enhancement of the values of its investments aggregating several hundred million dollars (R. 3-5; AWW. R. 4-6). Intelligent administration of such a business cannot be immobile and passive, but must be active, alive, and far-sighted. Freedom of action is absolutely essential, but such freedom is impossible without *knowledge of what may lawfully be done*, and without assurance of continuity of existence.

Until therefore the plaintiffs obtain a decree declaring the Act to be unconstitutional as against them, the validity of most of their corporate relationships and of practically every transaction or activity in which they normally engage will be subject to doubt and question. As the defendant Landis has himself suggested, what banker would undertake to sell, by public offering, an issue of their securities, until this stigma of illegality is removed by a *final* decision that the Act is void as applied to them? What must be the effect of that stigma upon *any* effort by them to negotiate a major or long-term contract, or to refund any of their outstanding securities or obligations?

For these reasons, it is clear that the Act, as is fully alleged in the bill of each plaintiff, constitutes a present and substantial cloud and encumbrance on its title to its investments, a present and substantial impairment of its freedom of contract, and a present impairment of its credit and of the value of its securities and other property. (See R. 6-22; AWW. R. 6-22).

And it is just as clear that although the plaintiffs have not registered, the provisions of the Act with respect to *registered* companies have to a large extent precisely the same paralyzing effect on the plaintiffs today as they would have if the plaintiffs had registered, since, in the event that the Act is held to be constitutional as to them, they will eventually be compelled to register and submit to its provisions applicable to registered companies. This is particularly true as to Section 11 of the Act, which contains the so-called "death sentence". If the Act is constitutional as to the plaintiffs, their refusal to register has rendered no less inevitable the infliction of this "death sentence" on them; so that their failure to register has in no way minimized the effect of this threat of complete corporate dismemberment and dissolution. And it is obvious that no large holding company like the plaintiffs, with this threat of early dismemberment and dissolution hanging over it, can make long-range plans, or give such assurances of permanent employment as are necessary in order to procure and retain efficient officers and a skilled executive and technical staff; or make the property acquisitions or long-term contracts that are essential to its growth and prosperity. Because of Section 11 every such company, whether registered or unregistered, must necessarily abandon policies followed by it over many years and necessary to its con-

tinued welfare, in favor of temporary expedients designed to tide it over the period of uncertainty (R. 6-11; AWW. R. 9-10). It goes without saying that this means not only immense, but also irreparable pecuniary loss.

We have already referred (p. 10) to the offers of the Commission to accept notices of registration under the Act containing "without prejudice" clauses. We think the above sufficiently shows that the plaintiffs could not escape the damages shown by their bills by registering under the Act, but on that point we also refer the Court to the later section of this brief (pp. 42-44) where this alleged justification of the stays is discussed. The bills of both plaintiffs allege fully the effect on them of the provisions of the Act dealing with registered companies, and the bill of the American Water Works Company (AWW. R. 17) expressly alleges that, although it is impossible to make precise calculations in the matter, the damages which it would suffer from registering appear to be at least as great as those which it is suffering as an unregistered company.

We submit that the above discussion shows clearly that the plaintiffs could not escape or minimize their damages by accepting the defendants' offer of a *temporary* injunction pending the decision of the *Bond and Share* case, but we also refer the Court to a special discussion of this offer in another Section (pp. 46-48).

And lastly, any argument based on the declarations of the defendants that non-registering holding companies will not be prosecuted for failing to register, or for doing any of the acts prohibited to unregistered companies, until after the Act has been held constitutional, will, we believe, be found to be fully answered in the Section (*infra*, pp. 45-46) dealing with the defendants' theory that the bills do not

show any right to affirmative relief in equity against registration because they do not show present threats to enforce the Act.

One other important point is to be noted: namely, that the question whether the provisions of the Act with respect to *registered* companies *are now damaging* the plaintiffs, *has nothing whatever to do* with the question whether these provisions of the Act are relevant in determining *whether the plaintiffs can constitutionally be required to register*. We call attention to this fact because it seems to us that the defendants' brief constantly confuses these two questions. But manifestly the actuality of the damages caused by these provisions of the Act to an unregistered company is the same whether these provisions are or are not to be taken into consideration in determining whether that company can constitutionally be required to register.

IV. THE COMMISSION'S OFFER TO PERMIT HOLDING COMPANIES TO REGISTER UNDER THE ACT "WITHOUT PREJUDICE"

The facts as to the Commission's offer to accept "without prejudice" notices of registration have already been stated (*supra*, p. 10).

The question, of course, is simply this: *how can this offer of the Commission justify the stay of these suits brought by non-registering companies?**

*We are assuming (though merely for the purpose of the argument) that "without-prejudice" notices of registration would be effective to their fullest possible extent, and also that this would *not* be true except for the offer of the Commission to accept such notices of registration. We therefore do not discuss whether, or to what extent, such reservations would be effective as against some later contention of the Government that registering under the Act constitutes a waiver of, or an estoppel to assert, its unconstitutionality generally or the unconstitutionality of any of its provisions.

Have the defendants stated that they have not sought or will not seek stays in suits brought against them by *registered* companies? Of course not. Do they admit that they would not be entitled to stays in such suits? Of course not. Do they argue that such a suit by a registered company would test "the validity of the essential features of the Act" more radically or thoroughly than these suits do? They do not. Do they say that such suits by registered companies would "clog the courts and overtax the facilities of the Government" less than suits of the same sort by non-registered companies,—that, for example, it would not take so long to prepare such suits for trial or to try them? They do not.

Have the defendants alleged that the damages which the Act is today causing the plaintiffs as unregistered companies, and which have driven them to seek relief in equity, would be less if the plaintiffs had registered? They have not, and the plaintiffs' bills show that this is not so.

How then can the stay be justified by the plaintiffs' failure to accept the Commission's invitation to register "without prejudice"? It would seem clear that any such justification must rest on some assumed moral obligation to accept this offer to register; and we think that this assumption underlies the many insinuations in the defendants' briefs and other papers that the refusal of the plaintiffs to register, together with the refusal of the great majority of the other utility companies subject to the Act to do so, is evidence of some sinister conspiracy among the utilities to attack the constitutionality of the Act unfairly and hamstring its administration by unethical methods. The Court will search the record in vain for any attempt by the defendants, other than as above stated,

to show *how* the rejection by the plaintiffs of the Commission's invitation to register without prejudice *can possibly have the slightest bearing on the merits of the motion for the stay.*

The defendants, however, have not pointed out a single reason, in law, equity, or business morals, why a holding company which is irreparably injured whether or not it registers, and which believes the Act to be unconstitutional as to itself, and which desires to test its constitutionality as promptly as possible should not do this *by refusing to register* and commencing a suit like the present suit,—*even though the company knew positively that it could, by an appropriate "reservation", register under the Act without thereby waiving its right to challenge, or estopping itself from thereafter challenging, its constitutionality in any respect whatsoever.*

We do not question the good faith of the Commission in making its offer to accept "without-prejudice" notices of registration; but the Commission's good faith is not the point. The point is that any holding company which believed the Act to be unconstitutional as to it, and which therefore for any reason preferred, despite the Commission's offer, to maintain the status of an unregistered company, remained, both legally and morally, as free to maintain that status after that offer as it had been before.

The Commission's offer to accept "without prejudice" registrations, moreover, *completely ignores the fact that registration by a holding company makes each and every one of its subsidiary companies subject to the Act, whether its registration is "without prejudice" or not.* This fact alone would afford ample reason for the refusal of any holding company to accept the Commission's offer.

V. PLAINTIFFS' RIGHT TO RELIEF IN EQUITY

The defendants' answer to the plaintiffs' petition for leave to appeal to the Court of Appeals contained the following admission (R. 204):

> "The respondents [now the petitioners] aver that *whether the petitioner's bill is ultimately determined to be with or without equity is irrelevant to the granting or denying of the stay.* The respondents did not move to dismiss petitioner's bill."

In spite of this disclaimer of the relevancy of the question whether the plaintiffs' bills show that they are entitled to equitable relief against the Act, the defendants' brief still questions the equity of the plaintiffs' bills.

We have already shown (*supra*, pp. 36-42) exactly how and why the plaintiffs are today suffering irreparable injury which they will continue to suffer until they obtain the *final* relief demanded by their bills. That no remedy exists at law is undisputed.

It is true that the announcements published by the defendants which we have heretofore referred to (p. 10) show that the plaintiffs need not at present fear a multiplicity of prosecutions under the penal provisions of the Act with reference to unregistered companies unless, of course, the defendants see fit to change their minds, as they are entirely at liberty to do. But the jurisdiction of equity to enjoin a multiplicity of illegal prosecutions is only one branch of its age-old jurisdiction to intervene to prevent irreparable injury.

Under various forms of statement, however, the defendants' brief asserts that the plaintiffs' bills do not sufficiently show present threats to enforce the Act against them to justify injunctive relief in equity. If by "present threats

to enforce" is meant threats to enforce at present or in the immediate future, there are of course no such threats, other than the standing threat flowing from the duty of governmental officials to enforce the law as written. But it is not denied that the defendants are vehemently asserting the constitutionality of the Act as against the plaintiffs, and that they do threaten to enforce it against them if and when they obtain a decision in the *Bond and Share* case which they think will sustain such enforcement; and it is of course *this* threat which is causing the damages alleged in the bills and heretofore discussed (*supra*, pp. 36-42). We believe, therefore, that the situation thus created falls clearly within the rule of the many decisions of this Court permitting injunctive relief against the enforcement of unconstitutional laws, even when there are no threats to enforce at once or in the near future. The cases are discussed in Appendix B of this brief.

It is also pertinent to remark that if the defendants really believed that their announcements that they will not prosecute non-registering companies for the present was a sufficient disproof of "threats to enforce" to deprive such companies of the right to affirmative relief in equity against the Act, *their stay was wholly unnecessary.* They had only to move to dismiss the plaintiffs' bills.

VI. THE OFFER OF A TEMPORARY INJUNCTION

The opinion of the learned trial court stresses the defendants' offer of a temporary injunction and shows, we believe, that the court considered this offer to be one of the principal justifications for the stay.* But the opinion no-

*This is only one of the reasons for the stay given in the opinion which the defendants are pleased to characterize as "Findings". They do not, however, refer to any evidence in support of it.

where attempts to show *how* such an injunction would even minimize the damages which the plaintiffs' bills show that the Act is causing them and will continue to cause them until they obtain *final* relief. And of course unless this can be shown the stay cannot be justified by the offer of the temporary injunction. And the repeated assertions in the defendants' brief that the offered injunction would make the stay innocuous are also, we believe, unsupported by a single reason.

It is undeniable and undenied that the only effect of such a temporary injunction would be to remove threats of immediate prosecutions under the penal provisions of the Act. These threats, however, had already been removed by the announcements of the defendants that they would not prosecute non-registering holding companies until after a decision in the *Bond and Share* suit holding the Act constitutional; and, as we have already shown, threats of immediate prosecution under the Act were precisely *not* the threats which were causing the damages to the plaintiffs which compelled them to ask for affirmative relief in equity. For the defendants would of course welcome a prompt prosecution for failure to register or a mandamus suit to compel them to register, because such a suit would give them the same opportunity for that prompt test of the constitutionality of the Act as applied to them which they are seeking by their present bills, and which the defendants by their stays have prevented.

We submit, therefore, that the complete answer to the alleged justification of the stay based on the defendants' offer of a temporary injunction is that *the present and continuing injury which the plaintiffs are suffering from the cloud which the Act casts upon the legality of most of*

their contracts and activities, and from the overhanging threat of dismemberment and dissolution in 1938, can be removed only by a FINAL *decree adjudging the Act to be unconstitutional as to them.*

VII. THE DEFENDANTS' ARGUMENT BASED ON THEIR THREAT TO DEFAULT IF THE STAY IS NOT GRANTED, *PENNSYLVANIA* v. *WHEELING BRIDGE CO.*

The defendants' brief argues that a final decree for the plaintiffs would be nullified (or, if not automatically nullified, could by some appropriate proceeding* be set aside) if the *Bond and Share* case is decided by this Court in favor of the Government on grounds which would render the decision applicable to the plaintiffs on the facts as to the plaintiffs' business alleged in the plaintiffs' bills. They assert that the case of *Pennsylvania* v. *Wheeling Bridge Company*, 59 U. S. 421 is authority for this proposition.

The Court will see at once that the question thus presented will arise *only if the stay is vacated* and if thereafter the defendants default, leaving the plaintiffs to take a decree against them *pro confesso***. And so, both on their oral argument and in their reply brief in the trial court, the defendants definitely threatened so to default if their stay

*Other of course than a direct appeal by the defendants, for the argument necessarily assumes that the time for a direct appeal will have expired.

**Of course no final decree against the defendants could be rendered even after a default unless the trial court was of the opinion that the Act was unconstitutional as against the plaintiffs on the facts alleged in their bills; but equally of course any such decree after default would be *res judicata* as to these *facts*, whether the defendants are right or wrong about the law as declared in the *Wheeling Bridge* case.

were not granted*, though for some reason they have not chosen to be quite so explicit about it in their present brief.**

This is the first instance in our experience where a litigant, asking the court to exercise its discretion in his behalf, has suggested that if the court should fail to grant his request, he would defeat the court's action against him by resorting to a device which he claims would nullify it.

We believe that it requires no argument to show that a court should not permit its discretion thus to be coerced. It should proceed in its normal course, and should put upon the defendants the risk of deciding whether to defend cases properly brought against them, or to default and rely upon the device which they assert (quite mistakenly as we think) would enable them to avoid any prejudice from such default.***

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*The opinion of the trial court states (R. p. 34):

> "If the defendants, *as they state they probably will do*, in the event these suits are not stayed, permit them to go by default, it is difficult to see how the plaintiffs would be any better off than if the suits were stayed. * * * The plaintiffs * * * could not appeal from a decree of this court in their favor, * * *."

The defendants' Reply Brief in the court below (p. 5) contained the following statement:

> "But since the Government *cannot pretend to defend these suits*, and since these plaintiffs cannot appeal any decree, which this Court may render in their favor, a final decree will be of no more advantage to them than a temporary decree."

**We think we may safely assume that the defendants do not contemplate answering the plaintiffs' bills, trying the cases on the merits, and *then*, if the decision is against them and the *Bond and Share* case still undecided, deliberately allowing their time to appeal to expire, in the hope of getting a final decision in the *Bond and Share* case on which they may rely to nullify or vacate the decree against them in the plaintiffs' cases.

***Moreover, as we have already pointed out (pp. 25-27), there is no longer any excuse for such a default on account of any threatened multiplicity of suits.

Equally astonishing is the complete *non-sequitur* contained in the argument by which the defendants' above proposition of law is sought to be made *a justification for the stay*. For the argument necessarily comes to this:

> If the stay we request is not granted, we have the 'right' nevertheless, by suffering judgment to go against us by default in this suit, to prevent it from being tried on the merits; and if we do this, and if our other suit is decided in our favor, the judgment in it (by reason of the similarity of the issues in the two suits) will render the default judgment against us in this suit unenforceable. *Therefore we are entitled to our stay!*

In other words, we have here a litigant alleging the very remedy which he claims lies in his own hands as his reason for asking the assistance of the court. For if the defendants are right about the holding in the *Wheeling Bridge* case, they have only to permit a decree by default to be taken against them in this case, and then, if and when the *Bond and Share* case is decided in their favor in such a way as to make it conclusive of the plaintiffs' cases, they can take whatever steps may be necessary to vacate, reverse, or otherwise nullify the default decree against them.

The defendants naturally have not put the argument in a form which reveals its fatal self-contradiction quite so glaringly as does the above statement of it.

The argument* seems to be to the effect that *the stay will not injure the plaintiffs.* In this form it would run as follows:

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*Apart from gratuitous and, we submit, wholly unjustified attempts to discredit the plaintiffs by charging them with trying to make a decree *in their favor* "the vehicle of an appeal".

> The stay will not injure the plaintiffs because, even if it had been denied, the plaintiffs would still continue, *should the defendants default*, to suffer *precisely the same damages to which the stay would subject them.*

But this is obviously only a disingenuous way of saying that *"the injury to the plaintiffs will not be caused by the stay"*, which is simply not so, because *if the stay is granted there will be no default decree.* In short, the defendants are asking the Court to inflict the injury, because (so they say) they have it within *their* power to inflict it if the Court declines to act. We submit that an argument of this sort requires no further discussion.

For the foregoing reasons it is wholly unnecessary in this case to consider whether the decision in the *Wheeling Bridge* case is authority for the proposition that an unappealed final decree in favor of the plaintiffs might be rendered nugatory by a later decision of the *Bond and Share* case by this Court in favor of the Government. However, since we do not think that the *Wheeling Bridge* case stands for any such proposition, we have discussed it and the other cases cited by the defendants in this connection in an Appendix (Appendix C), should the Court wish to consider the question.

VIII.—THE *BOND AND SHARE* CASE.

We submit that what we have heretofore said makes it unnecessary for the Court to consider the elaborate discussion of the *Bond and Share* case contained in the defendants' brief. Nevertheless, should the Court be of the

opinion that mere similarity of issues between two cases simultaneously commenced in different courts may in certain circumstances justify the granting to the only party common to both cases of an *in limine* stay of one of them until the final determination of the other by the court of last appeal, we believe that we can show clearly that no such circumstances exist in the case at bar.

It seems to be entirely clear that the defendants' discussion of the *Bond and Share* case proceeds throughout on the implied assumption that the stay can be justified if the defendants can show merely a sufficiently close similarity between the character of the business done by Bond and Share itself (or by one or more of its holding-company subsidiaries which are now parties to the suit), and the character of the business done by the plaintiffs and their subsidiaries as shown by their bills in the cases at bar.

We most emphatically challenge the correctness of this assumption.

Stated briefly, its manifest vice consists in the fact that, even if the relevant business of the Bond and Share Company (or of one of its holding-company subsidiaries) was *identical* with the relevant business of the plaintiffs, *the stay itself* will still have caused irreparable injury to the plaintiffs, unless (a) the *Bond and Share* case reaches and is decided by this Court, and unless (b) the decision of this Court (if it is in favor of the Government) is in substance to the effect that the Act is constitutional as to the Bond and Share Company (or as to one of its subsidiary holding companies) *precisely because of the facts with respect to the business of such company which make its business identical with the business done by the plaintiffs.*

For it is indisputable that if the *Bond and Share* case either never reaches decision in this Court, or is decided by this Court in favor of the Government on grounds substantially different from those which we have just indicated, then *the stay itself* (since the plaintiffs' bills will still remain not even *answered*) will have added at least a year and a half, and very likely a good deal more, to the time during which the plaintiffs will have had to wait for either a decision of their own cases on the merits, or a decision in the *Bond and Share* case which will really "clarify" the issues in their cases.*

The discussion of the *Bond and Share* case in the defendants' brief tacitly ignores the possibility of such an outcome of the *Bond and Share* case. The purpose of subdivisions "First" to "Sixth", inclusive, of this section of our brief is to show that *in their briefs in the Bond and Share case the defendants themselves argue at length that such an outcome of the Bond and Share case is probable or possible.* These arguments are a part of the elaborately argued propositions of law by which the defendants seek to limit the scope of the *Bond and Share* case to the single question of the constitutionality of the provision of the Act requiring registration.

The purpose of subdivision *"Seventh"* of this Section is the same, and *also* to show that the defendants have *not* shown any similarity between any important issues of fact in the plaintiffs' cases and in the *Bond and Share* case which can possibly justify the stay—assuming for the purpose of argument that demonstrated similarity of some of

*We are of course not speaking of a decision *against* the Government in the *Bond and Share* case which the Government will recognize as decisive of the plaintiffs' cases.

such important issues of fact might be held to justify the stay.

The Court will understand that in what we have to say in this Section as to the legal positions taken by the Government in its briefs in the *Bond and Share* case, we are merely stating what those positions are. We wish to make it clear that we do not subscribe to any of them.

We assume that it is entirely permissible in this discussion of the *Bond and Share* case to refer to the stipulated facts on which that case will be tried in the district court and to the arguments made in the Government's briefs already filed in it. Not only does the defendants' brief do the same thing,* but the Court will also recall (see *supra,* pp. 7-8) that in the Court of Appeals the defendants relied on many matters which were not shown by the record in the trial court, and not even called to its attention—including events which occurred after the granting of the stays. Indeed, it seems quite clear that the defendants now recognize that the similarity between the issues in the plaintiffs' cases and the issues in the *Bond and Share* case, *as any such similarity is disclosed by the record in the trial court*—the original bill in the *Bond and Share* case and the bills in the plaintiffs' cases—is wholly insufficient to support the stay. This omission the defendants therefore now attempt to supply by argu-

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*Indeed, we believe that the Court will see that the point on which the defendants now place their *main reliance* in this connection is the alleged virtual identity of the business done on the one hand by the plaintiffs and their subsidiaries, as shown by the plaintiffs' bills, and the business done on the other hand by two of the Bond and Share holding-company subsidiaries and their subsidiaries, *as shown by the stipulated facts in the Bond and Share* case. This alleged similarity is fully discussed under subdivision *Seventh.*

ments based on what the record in the *Bond and Share* case shows *as it now stands. Our reply is that that record as it now stands contains its own complete answers to these arguments.*

We therefore will now show the different outcomes of the *Bond and Share* case (including decisions of it by this Court) which would certainly or probably result in making *the stay itself* the cause of irreparable injury to the plaintiffs. With one exception, each of these outcomes of the *Bond and Share* case is definitely foreseen as probable or possible by the Government's briefs in that case, and some of them are outcomes which must or may be the result of propositions of law definitely argued by the Government in those briefs, if this Court sustains those propositions.

First. There is, of course, the possibility that the losing party may not appeal from the decision in the *Bond and Share* case. The Government in other recent cases involving important constitutional questions has failed to appeal, or, having appealed, has dismissed its appeal before argument.

If that eventuality should develop in the *Bond and Share* case the stays here would have inflicted upon these plaintiffs an inexcusable delay and enormous injury, leaving them with their cases only at the threshold of the court and years of litigation still confronting them.

Second. The Bond and Share companies may, before the *Bond and Share* case reaches this Court, decide to register under the Act or so to reorganize their affairs as no longer to be subject to it. In that event, of course, the *Bond and Share* case would never be decided by this Court

and the stay would have caused the plaintiffs immense and irreparable damages.

The Government's brief in the *Bond and Share* case *stresses the possibility of a variety of events which would thus dispose of the case.* This is in connection with the Government's argument (of which more hereafter) that the question whether a holding company may constitutionally be required to register must be determined solely on the provisions of the Act with respect to registration—*i.e.*, wholly without regard to the regulatory provisions with respect to registered companies. Some of these possibilities are thus described in the Government's brief:

> "The crux of the matter is that the defendants do not now say, and certainly this Court cannot predict, what acts they or their subsidiaries will perform if and when the defendants are required to register. This is true not simply as to security offerings and acquisitions, but it is true as to all activities of the defendants and their subsidiaries. Since the filing of the plaintiff's bill, two of the intervening non-exempt holding-company defendants —Idaho Power Company and The Montana Power Company—have acquired all of the properties of their utility subsidiaries and have ceased to be holding companies, thereby altering radically their conjectural future obligations under the Act (S. 266, 343). Somewhat earlier, but after the Act had become law, the defendants purported to make extensive adjustments to eliminate interlocking directorates and to reorganize their service arrangements (S. 327-331, 352-357).
>
> "Who can say that the defendants will not have made even more drastic and radical changes in the conduct of their affairs by the time they actually register? Certainly the defendants have made no

such assertion. *Defendants' future action may be dictated by a multitude of considerations wholly unrelated to the validity or invalidity of this Act. The tax policy of the federal government, the tax policy of the states, the administrative policies pursued by the plaintiff commission and by state regulatory commissions, the trend of public sentiment, these and many other factors may each vitally affect the future plans and affairs of the defendants.* They may decide, for example, to make Ebasco, their newly created service subsidiary, completely independent of the control of the Electric Bond and Share Company. Or they may decide to have Ebasco perform its services at cost, as defendant American Gas professes to do (S. 459-461) and as Ebasco's charter permits it to do (S. 870). *They may attempt to regroup their subsidiaries into independent regional systems."* (Brief on Scope of Issues, pp. 55-56.)

Again:

"Even a company of the size and scope of Bond and Share may avoid the necessity of divesting itself of any of its assets by becoming a true investment company and giving up its control over operating utility companies." (Brief on Scope of Issues, p. 57).

Again:

"While they deny the validity of the Act, the defendants have already taken some steps in the direction of compliance; it is impossible to say what further steps they make take before the Supreme Court finally adjudicates the issues involved in this proceeding. If required to register, the defendants may be able to abide by the alternative of not engaging in any of the activities prescribed in section 4(a). If

> the defendants find that their activities require them to register, they may fairly seek time to adjust their affairs before having this Court pass upon the application to them of provisions affecting registered companies." (Brief on Scope of Issues, p. 66.)

Third. By motion to dismiss the counterclaims and cross-bills of the *Bond and Share* defendants, the Government has asserted that evidence, to which over 78 pages of the stipulation and exhibits are devoted, shows that those defendants are equitably estopped from asserting that they may not constitutionally be required to register. A section of the Government's brief is devoted to this proposition, which is stated as follows:

> "The defendants are especially without equity in asking this Court to consider their cross-bill before they have registered and complied with the law. Through their representatives, defendants appeared before the committees of the Congress when the Act was under consideration and, although they opposed the passage of the Act as introduced and in its final form, insisted before the Congress that they were in favor of federal regulation of utility holding companies.
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> * * *
>
> "* * * the representations they have made to the Congress * * * mark the defendants as signally deficient in that equity which a court requires of suppliants for equitable relief." (Brief on Scope of Issues, pp. 122, 124-125.)

If these contentions by the Government are accepted by the Court and the Bond and Share defendants are held, because of representations they have made to the Congress, to be equitably estopped from asserting that they

may not constitutionally be required to register, there would of course be no decision by this Court decisive in any way on the constitutional questions raised by the plaintiffs' bills. It is no answer for the defendants to say that similar acts of estoppel *might* be proved against these plaintiffs. There certainly is no *presumption* that these plaintiffs are estopped. *The plaintiffs do not know what representations Bond and Share may have made to the Congress, but they do know that they themselves have made no representations which would estop them from asserting the unconstitutionality of the Act.*

The Court will readily see that in each of the contingencies so far discussed there will have been a final disposition of the *Bond and Share* case, after the stay has run for a year and a half at least, which will not even have touched —to say nothing of "clarifying"—a single issue tendered by the plaintiffs' bills.

Fourth. The nature of the business done by holding companies is not the only relevant factor in determining the constitutionality of the Act. The nature and extent of the cost of compliance with the Act, and the other damages and difficulties which will result from compliance with it, are also relevant factors; and the plaintiffs' bills therefore challenge the Act as in violation of the Fifth Amendment to the Constitution, as well as asserting that, as to the plaintiffs, it is not within the powers granted to the Congress by the Commerce Clause. In other words, the allegations of damages in the plaintiffs' bills are material as well *on the question of the constitutionality of the Act as applied to them*, as on the question of equitable jurisdiction,—namely, whether the bills show a right to affirmative injunctive relief against

registration. The Government's brief in the *Bond and Share* case argues at length that the Bond and Share defendants *have proved no damages.* It is stated:

> "* * * it is also clear that there is not the slightest proof in the record that the defendants have been damaged, irreparably or otherwise by the Act or by any action or threat of action by the plaintiff or by any cross-defendant. * * * *The defendants have failed to submit a scintilla of proof* that they are now exposed, or that they will be exposed when they become registered companies, to any damage, irreparable or otherwise, by reason of any provision of the Act." (Brief on Scope of Issues, p. 125.)

It is obvious, therefore, that, if the evidence in the *Bond and Share* case sustains the above conclusion of fact which the Government draws from it, the *Bond and Share* case will go up on a record which, as concerns the plaintiffs at bar, will differ in a vital and possibly determinative respect from the record which the plaintiffs will make. For it must, of course, be assumed for the purpose of this case in its present aspect, that the facts as to the injuries suffered by these plaintiffs are correctly alleged in their bills.

Fifth. We are sure that counsel for the plaintiffs will not deny that one of the most strenuously argued positions taken by the Government in its briefs in the *Bond and Share* case is that the question of the constitutional right to require holding companies to register under the Act must be determined *solely* from the provisions of the Act as to *unregistered* companies—the provisions requiring registration and imposing penalties for not registering,—*i.e.,* without reference to any of the provisions with respect to com-

panies once they have registered. Pages 12 to 118 of the Government's Brief on the Constitutionality of the Registration Provisions of the Act is devoted to an elaborate argument of this proposition. The bills of the plaintiffs at bar take the diametrically opposite position,—namely, that the constitutionality or unconstitutionality of the regulatory provisions of the Act have a vital bearing on the question of the constitutionality of the requirement of registration.*

If, then, the trial court in the *Bond and Share* case should accept this position of the Government as sound and on that basis make a decree requiring the Bond and Share defendants to register, but if this Court should disagree—holding the provisions of the Act with respect to registered companies to be relevant on the question of the constitutionality of requiring registration,—we do not see how it can be said now that in such an event the record before this Court on the *Bond and Share* appeal would certainly be in such a form that the decision of this Court would not require remanding the case for further proceedings in the district court. For it would appear to be entirely likely that in such an event this Court would consider that, before it could properly make a final decision in the case, additional findings would have to be made by the trial court in connection with the matters which its decision thus made relevant. Thus the stay would leave the plaintiffs' bills unanswered until after two trials of the *Bond and Share* case in the trial court and two appeals to this Court. These plaintiffs would escape that enforced and injurious delay by a prompt trial and proper disposition of their own cases in the trial court.

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*This is also true of the counterclaims and cross-bills of the *Bond and Share* defendants.

It is difficult to conceive of positions more strikingly inconsistent than those which the defendants have taken at various times as to the scope of the *Bond and Share* case.

In their petition to this Court for writs of certiorari in the cases at bar, the defendants refer to the *Bond and Share* suits and to the suppositious decision by this Court in that case, and state that:

> "Certainly none of the suits sought to be stayed would afford as broad, as comprehensive, or as certain a decision as to the validity of the Act as the Bond and Share suits" (p. 11).

They also state, with reference to the *Bond and Share* case:

> "Furthermore, no fairer or broader test of the Act can be suggested."

In the "Statement of the United States of America as Amicus Curiae," opposing the petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit in the case of *Burco, Inc.* v. *Whitworth et al.*, 81 F. (2d) 721 (C. C. A. 4th, 1936), cert. denied 297 U. S. 724, the Government states that the *Bond and Share* cases,

> "far broader in their coverage of the problems of the industry than this restricted proceeding, will offer a truly adequate case to test the constitutionality of the Act in a proceeding in which the Government has had an opportunity to share and that the decision would apply to typical holding company situations, which Congress had in mind at its enactment."

Regardless of the intentions of the Government in making these statements, there can be little question but that the

impression thus created is that the Bond and Share cases will afford a broad and comprehensive test of the constitutionality of the Act. Such statements are in strikng contrast to the vigorous and uncompromising position which the Government is taking in the Bond and Share case, in seeking to limit the issues therein to the single question of the constitutionality of the provision of the Act requiring public utility holding companies to register with the Commission. In their brief in the *Bond and Share* case the defendants state:

> *"The case now before this Court raises the single question of the validity of sections 4 (a) and 5 as applied to these defendants; it cannot raise an imaginary controversy over the hypothetical application of some other provision of the Act to these or some other holding companies.* How far parts of the Act may be sustained if other—not the subject of any controversy in this case—fail, are matters upon which this Court 'need not speculate now.'" (Brief on Scope of Issues, p. 39.)

They further state:

> *"In seeking to enforce one particular provision of a long and complicated statute,* the Government cannot be deemed either as a matter of fact or of law to have consented to be sued for the purpose of determining the validity of other provisions of the statute." (Brief on Scope of Issues, p. 118.)

Sixth. The defendants' brief at bar seems quite clearly to assert the proposition that *the character of the business and activities of any particular holding company or of its subsidiaries is wholly immaterial on the question of whether it can constitutionally be required to register, provided only the company is within the definition of Section 2 (a) (7).*

While the Government's briefs in the *Bond and Share* case do not devote any section or subdivision to the explicit statement and argument of this proposition, nevertheless we believe we will not be contradicted when we say that these briefs do show that the Government does assert the above to be the law, even though the Government may not feel that it is necessary to raise or press the point in that case in order to obtain a decree in its favor.

Accordingly, it seems clear that (exactly as in the case of the Government's contention in the *Bond and Share* case, stated above under "*Fifth*") it cannot now be certainly stated that the assertion of this proposition of law by the Government in the *Bond and Share* case may not result in a reversal of the decree of the district court *and a remandment for further proceedings therein: i.e.*, in the event that the trial judge accepts this contention of the Government as good law, confines his findings of fact accordingly, and that this Court, on the appeal, disagrees with him. Such an outcome, if the plaintiffs' suits are stayed, would prolong the delay in the trial of the plaintiffs' suits for an additional indefinite period.

Moreover, if this position of the Government is correct, then they have conclusively demonstrated that they do not need the stay which they here seek. Their constitutional arguments could be fully presented to the courts upon a motion to dismiss the plaintiffs' bills, with absolutely no trial on the facts. The plaintiffs have alleged in their bills all facts necessary to bring them within the Act and motions to dismiss the bills would have raised the question squarely.

As a matter of fact, a motion to dismiss, in *only one* of the stayed cases would for practical purposes have

been quite sufficient; for the motion would have raised a pure question of law *undeniably common to all of them,* and, if decided in favor of the Government, *decisive* of all of them. If such a motion had been promptly made, the decision on it would today probably be *at least* well on its way to decision by this Court. And yet the defendants have not even sought this easy, inexpensive, and prompt way of finally disposing (if they are right in their view of the law in this respect) of every one of the stayed cases,—*even though the presentation of the question would have consisted merely of putting into a brief in one of the stayed cases the arguments and authorities which Government counsel have no doubt long since prepared and collected for presenting it.* The plaintiffs' bills, of course, could only *tender* this issue of law.

And of course, if the defendants are correct in their assertion that the character of the business and activities of any particular holding company or its subsidiaries is immaterial on the question of whether it can constitutionally be required to register, so long as it is a holding company within the definition of Section 2(a)(7), then how can they envisage that the trial of plaintiffs' cases *on the facts* would require six months; that the preparation for trial for plaintiffs' suits would be "comparable in magnitude to an important anti-trust case" (dfts.' br. p. 90); that "a proper presentation of facts" in plaintiffs' cases "would require months of investigation"; that "it would probably take six months to complete a record in either of these [plaintiffs] suits comparable to the record built in the Bond and Share suits, upon which the Government has had a corps of men working for nearly a half year"! (dfts.' br. pp. 91-92).

Seventh. Lastly, we come to the alleged similarity of the issues between the plaintiffs' cases and the *Bond and Share* case based on the alleged similarity of the character of the *business done* respectively by the plaintiffs and the Bond and Share Company and their subsidiaries—or, as the defendants' brief now more particularly asserts (see *supra*, p. 54, footnote), on the asserted practical identity of the business done *by the plaintiffs' subsidiary operating companies* with that done by subsidiary operating companies of two particular *subsidiary holding companies* of Bond and Share which are also defendants in the *Bond and Share* case. For, as we have already pointed out, we believe that the defendants' brief now tacitly concedes that the record as to "similarity" of business on which the trial court granted the stays—the plaintiffs' bills and the Government's original bill in the *Bond and Share* case—does not establish a sufficient "similarity" of issues to justify the stay, even on the defendants' theory that similarity of issues may justify stays such as this.*

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*Should the Court wish to compare merely the *bills* in the plaintiffs' cases with the Government's amended bill in the *Bond and Share* case, the following comparison is submitted

The Commission's bill in the *Bond and Share* case alleges that that company is the top holding company of a utility system operating in some thirty-two different states, many of which are inter-connected through interstate transmission facilities and that a substantial portion of these utility companies are engaged regularly in the interstate transmission and sale of electric energy and gas (R. 50-51, 58-61). It alleges further that Bond and Share and one of its principal subsidiary holding companies, its co-defendant, American Gas and Electric Company, so *dominate and control* all of their subsidiary companies engaged in such interstate transmission and sale of electricity and gas that *Bond and Share, and American Gas, are themselves, in their own corporate capacity, engaged in the transmission and sale in interstate commerce of electric energy and gas* (R. 58-64).

It further alleges that Bond and Share, through its wholly owned and completely dominated subsidiaries, Ebasco Services, Incorpo-

Although, as shown above (*supra, "Sixth"*), the Government is making the contention that *any* holding company within the definition of Section 2(a)(7) of the Act may constitutionally be required to register, nevertheless we do not think that counsel will deny, *first*, that the Government (at least in its briefs in the *Bond and Share* case) has not argued this contention with any great zeal, and that these briefs do (to put it very mildly) recognize the possibility of a holding by this Court that some holding companies within the definition of Section 2(a)(7) may and some may not constitutionally be required to register; or will deny *second*, that the Government's contention is that the principal (if not the only) test of constitutionality

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rated, and Phoenix Engineering Corporation, has negotiated, entered into and is performing service contracts with operating subsidiaries of certain holding company subsidiaries of Bond and Share (R. 64-77). The great detail with which these service contracts and their subject matter is alleged, and the allegations that their performance amounts to a constant and regular traffic in interstate commerce by Bond and Share, show clearly that the Commission regards these facts as the facts *par excellence*, which will bring Bond and Share within the constitutional pale of the Act, if nothing else will.

The bills of complaint of both plaintiffs, on the other hand, show that neither is engaged in activities in any way comparable to those alleged by the Commission against the Bond and Share companies.

The bill of each plaintiff alleges that it is not engaged in the business of selling or transporting or causing to be sent or transported goods or commodities in interstate commerce, and that such use as it makes of the mails or the instrumentalities of interstate commerce is merely incidental to the conduct of its intrastate business (R. 5; AWW. R. 6).

The American Water Works bill shows that but little more than half of its capital assets consists directly or indirectly of investments in "public-utility companies" as that term is defined in the Act, approximately 40% of its total capital assets being represented by direct ownership of securities of water works companies. Substantially all of the remainder of its capital assets are represented by direct ownership of over 95% of the outstanding voting securities and certain other securities of a single holding company, The West Penn Electric Company, the great majority of the assets of which consist

in this respect is the nature of the business done by each holding company,—*including* in the expression "nature of the business done" the business done by its subsidiary operating companies *and the extent to which the business of these operating subsidiaries is* ACTUALLY MANAGED AND DIRECTED BY THE PARENT CORPORATION, as distinguished from being potentially controlled by stock ownership. *The Government has filed a separate brief of 149 pages which is exclusively devoted to establishing the single proposition that the "business", as above defined, of the Bond and Share Company affords constitutional warrant for requiring it to register under the Act.*

Now, the striking thing about this brief of the Government dealing with the facts as to the Bond and Share Company and its subsidiaries is that it deals with

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of substantially all of the common stock of two electric utility companies, which with their electric utility subsidiaries operate in a single area falling within adjacent parts of five States (AWW. R. 4).

The North American bill shows that the public utility subsidiaries of that company comprise in the main, electric properties, with some small amount of gas and transportation properties, centered primarily in certain large urban communities; and that its subsidiary companies which do own and operate facilities for transmission of electric energy in interstate commerce engage in such activities as an incidental part of the predominantly intrastate business of the integrated systems to which they belong (R. 3).

Moreover, as contrasted with the extensive and comprehensive services which the Commission's bill alleges that Bond and Share Company and American Gas and Electric Company render to their utility subsidiaries, *the North American bill shows that company not to be a party to any construction, sale or service contracts, and that it renders no such services to its subsidiary companies* (R. 5), and the American Water Works bill shows that that company is not engaged in activities in any way comparable to those in which it is alleged Bond and Share are engaged.

The extreme importance which the Commission attaches to the above-mentioned allegations of its bill against Bond and Share is manifested by the fact that a major part of the bill is devoted to such allegations.

these facts first and foremost and almost exclusively, not as facts concerning the different separate defendant companies the compulsory registration of which is sought, but as facts concerning the Bond and Share Company *itself* as the head of the system. Little is said in it about the business of any subsidiary company in the Bond and Share system (whether it be a direct or an intermedate subsidiary, or itself a holding or an operating company, or partly both) *as the business of that particular company, considered as an independent objectant to registration apart from its relation to Bond and Share itself.* It is throughout virtually assumed that *if Bond and Share must register,* so must the other defendants in the case, compulsory registration of which is sought. *Not a single section of the brief is devoted to discussing the question whether a single subsidiary holding company of Bond and Share could constitutionally be required to register* IF IT WERE NOT A SUBSIDIARY OF BOND AND SHARE.

In short, the brief, like the bill of complaint, deals with every subsidiary holding-company defendant in the *Bond and Share* case first and foremost and almost exclusively *as a subsidiary of Bond and Share itself.* This is as true of the two holding-company subsidiaries of Bond and Share which the defendants' brief now singles out as almost identical with the plaintiffs at bar in respect of the business carried on by their subsidiary *operating* companies, part of whose business may be said to be interstate commerce, as it is of the other subsidiary holding-company defendants in the *Bond and Share* case.

What, then, is the reason for this almost exclusively group treatment or, as it might be called, "clan" treatment, of the facts as to the Bond and Share companies in the

Government's bill and briefs in the *Bond and Share* case? The reason (as might indeed be easily guessed) is clear. It is that the Government's prime and unremittingly pursued purpose is to show that Bond and Share is *itself directly engaged* in interstate commerce precisely because the Bond and Share companies constitute a tribal clan of the good old-fashioned sort from every member of which to the remotest degree of consanguinity the head of the clan may and does autocratically exact prompt and unquestioned obedience, and that *because of this fact* Bond and Share can constitutionally be required to register (R. 58-64, 65-77). Throughout the brief, and in every conceivable connection, the stipulated facts are marshalled by the Government in an effort to show that the actual immediate direction and management of the business and policies of the Bond and Share operating subsidiaries engaged in interstate commerce is to such an extent that of the management of Bond and Share itself as to justify, for the purposes of the Act, a "piercing of the corporate veil". In short, the principal allegations in their bill, and the main argument of their briefs, in the *Bond and Share* case is that, however it may be in the case of holding companies which merely use their stock ownership in subsidiaries to elect directors who will represent their interests, Bond and Share in so many ways short-circuits any such management by Bond-and-Share-elected directors, as to justify a finding that Bond and Share *itself* is doing the interstate commerce of its operating subsidiaries. This argument of the Government is thus summarized in its briefs. (Factual Brief, pp. 73, 77.)

> *"In a word, Bond and Share provided the eyes through which the holding defendants saw, the ears*

through which they heard, the brain with which they planned, and the arms through which they acted."

* * *

"The holding defendants must accept and act upon the judgment of the service organization of Bond and Share in the administration of their investments in their subsidiary companies. * * *"*

The plaintiffs' bills on the other hand negative in the clearest possible way any relations such as the above between the plaintiffs' and their respective operating subsidiaries. They show clearly that the plaintiffs' operating subsidiaries are in every sense of the word self-governed and self-directed companies, despite the plaintiffs' ownership (direct or indirect) of their stocks, even where such ownership may be majority ownership.

The one other argument upon which the defendants rely in seeking to obtain a decision that Bond and Share may constitutionally be required to register is that because of and through its "interstate" services the Bond and Share system constitutes one "interstate empire" and that "the members of the Bond and Share system are but units of a single organization under common management and control". The defendants contend that the services rendered the operating subsidiaries in the Bond and Share system by the Bond and Share service organization, Ebasco, Inc., and American Gas constitute interstate commerce to a sufficient extent to subject the entire Bond and Share system to federal control and regulation (R. 64-77).

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*The specific fact allegations upon which the Government relies in these arguments are set forth at length in their bill of complaint (R. 58-77) and in their Factual Brief (pp. 20, 25-26, 35-36, 40-41, 46-47).

In their briefs in the *Bond and Share* case they state:

> "It is inconceivable that the supervision and advice provided by Ebasco and American Gas are any the less interstate commerce than the correspondence courses of instruction conducted by the International Text Book Company." (Brief on Constitutionality of Registration Provisions, p. 184.)

and further that

> "The conclusion is inevitable that services such as those performed by Ebasco and its wholly owned subsidiary Phoenix as well as those performed by American Gas are themselves interstate commerce. Such services are regularly and systematically performed as part of a continuous course of business. Such services not only constitute doing business in interstate commerce, in the most technical sense, but they constitute a business in interstate commerce most far-reaching in its effect and influence upon the course of interstate trade and commerce." (Brief on Constitutionality of Registration Provisions, pp. 207-208.)

and further:

> "If these various services of Ebasco and Bond and Share involving the direction of purchases and shipments of goods in interstate commerce aggregating several millions of dollars per annum and involving the sale of intangible services, information, and reports, for fees and charges running into hundreds of thousands and even millions of dollars a year, do not constitute interstate commerce, then interstate commerce is an artificial conception having no relation to the practical facts of business. Such a conception of interstate commerce has no basis in fact or in constitutional law." (Factual Brief, p. 139.)

They state in conclusion in their argument on the interstate character of the service business of Ebasco and American Gas that "as a matter of fact *it is difficult to imagine a business more completely interstate than the service business of Ebasco and American Gas.*" (Factual Brief, p. 135).

Contrasted with this alleged interstate business within the Bond and Share system, The North American Company's bill shows that it renders no services of any nature whatsoever to its subsidiary companies (R. 5) and the American Water Works' bill shows that it renders services in no way comparable to those attributed by the Government to the Bond and Share companies.

Let us return, then, to what, as above stated, appears now to be the defendants' sole remaining basis for their assertion of any really striking similarity between the business of the plaintiffs and the business of any of the *Bond and Share* defendants,—the resemblance, namely, between the interstate business done respectively (a) by some of the defendants' operating subsidiaries, and (b) by the operating subsidiaries of two of the holding-company subsidiaries of Bond and Share.*

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*The defendants' brief (see pp. 10, 88) complains that none of the subsidiaries of either plaintiff are joined as parties plaintiff to the plaintiffs' bills, and it refers to the two suits (one by a subsidiary of each plaintiff) commenced in the Delaware and in the Maryland district courts. It is clear, however, that the joinder of the plaintiffs' subsidiaries as parties to the plaintiffs' suits is not in the least necessary to enable the defendants to prove any facts that they may wish to prove with respect to the relations between the plaintiffs and their subsidiaries. Moreover, as we have clearly stated in our briefs in both courts below, the plaintiffs will bring these two subsidiaries into their own cases as parties plaintiffs if the defendants wish them to. They will also bring in any other of their subsidiaries. There is therefore no justification for the defendants' above complaint.

We submit respectfully that it is plain from the foregoing that, from the point of view of the central and dominating argument of the Government in the Bond and Share case in support of the constitutionality of the Act as against the Bond and Share defendants, even absolute identity between the business done by any operating subsidiary of either of the defendants at bar and the business done by the operating subsidiaries of the two holding-company Bond and Share subsidiaries in question, is wholly irrelevant. For, from the point of view of this argument of the Government, the vital and controlling similarity obviously is, not any similarity between the business done by the operating subsidiaries of two holding companies, but the similarity between the nature and extent of the control exercised over their respective operating subsidiaries by the two holding companies. This necessarily follows from the fact that the argument is that a holding company is engaged in interstate commerce (and therefore constitutionally within the Act), not because operating companies of whose stock it happens to own so-and-so many shares are so engaged, but because the actual relations between it and these subsidiaries are such that their acts must be regarded as its acts.

The Government's brief in the *Bond and Share* case clearly shows that the similarity of issues which the defendants must establish in the cases at bar in order to justify their stays (assuming again for the purpose of argument that the stays *can* be justified by similarity of issues) is similarity *of the facts as to active dominance and direction and servicing of operating subsidiaries by a non-registering non-operating holding company.*

It is clear, therefore, that even a decision by this Court of the *Bond and Share* case *on the merits* in favor of the Government on the theory asserted in the Government's brief on the facts will not constitute a decision of it on an issue of fact which has been shown to be *similar to any issue yet raised or suggested in the plaintiffs' cases.** Such a decision, like the decisions discussed in other subdivisions of this Section, would leave the ultimate decision of the plaintiffs' cases, their bills being still unanswered, as uncertain as on the day when the motion for the stay was made.

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*With reference to the statements concerning the plaintiff, The North American Company, on page 57 of the defendants' brief, under the heading "Service Contracts", we wish to state that North American Light and Power Company is not a "wholly owned subsidiary" of The North American Company. North American owns a majority of the voting stock of North American Light and Power but substantial amounts of that company's voting stock and other securities are owned by others. Also North American Light and Power does not either directly or indirectly engage in the performance of any services for its subsidiary companies or for any other companies.

The defendants' brief (p. 91) criticises as misleading the allegation in the North American bill that "none of the public utility companies or holding companies or other companies *in which the plaintiff owns any stock* engages in or employs any of its properties in the generation, transmission or distribution of electric energy in interstate commerce". The criticism is that this allegation is intended to give "the impression that no company anywhere in the North American system under the control of The North American Company is so engaged in interstate commerce". We submit that no competent lawyer reading the complaint could possibly believe that the words "companies in which plaintiff owns any stock" were intended to mean more than what they plainly say. But over and beyond this, if counsel who wrote this portion of the defendants' brief had seen fit to read the North American bill carefully he would have found that it specifically alleges that "* * * plaintiff, in the exercise of its lawful corporate powers, controls securities of certain 'subsidiary companies' which, as incidental to their business, own and operate utility assets for the transmission of electric energy in interstate commerce * * *" (R. 20).

CONCLUSION

Without imputing bad faith to the defendants, we submit that their attempt by these stays to preempt the entire field of litigation over the Act pending the final decision of their own *Bond and Share* case raises a question that goes much deeper than the question of the good faith of any litigant in selecting one adversary from among many and in determining when and in what court to litigate with him.

It is beyond the ability of any litigant to discriminate the issues in or foresee the eventualities of all the different legal contests in an arena so vast as that in which the defendants are now engaged against the utility companies. In each of these contests the decision may mean life or death to one or more of these companies, and delay in the decision of the case of each will mean serious loss and injury to it. When all is said and done, the defendants in asking for their stays are asserting more than a right merely to decide which one of their adversaries shall first be privileged to contest with them to final determination the momentous constitutional questions involved in these cases. For, in asserting that right they are also asserting both the right to keep their other adversaries voiceless with respect to the issues which may be common to all of these suits, and the right to subject them, for an indefinitely long period, to the injuries which they will suffer from their inability to obtain prompt adjudications of the issues peculiar to their own situations.

We believe that the privilege which these defendants have been permitted to exercise in obtaining these stays is a privilege which approaches too closely the right of sitting in judgment in one's own cause to permit of its being

accorded to any litigant, however honest and well intentioned, not even to the officers and agents of government.

We submit that in this respect as in every other Judge van Orsdell was right when he stated in his opinion: "The Government of the United States as a litigant has no greater rights than the humblest citizen." We submit that the defendants' stays are in clear violation of the spirit of a democracy such as ours.

Respectfully submitted,

JOHN C. HIGGINS,
48 Wall Street,
New York, N. Y.

JOHN S. FLANNERY,
Hibbs Building,
Washington, D. C.
Counsel for Respondents.

JOSEPH P. TUMULTY,
1317 F Street, N. W.,
Washington, D. C.
Counsel for Respondent, American Water Works and Electric Company, Incorporated.

SULLIVAN & CROMWELL,
New York, N. Y.

McKENNEY, FLANNERY & CRAIGHILL,
Washington, D. C.
Of Counsel.

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